

September 10, 2021

## FREEDOM OF INFORMATION ACT REQUEST

*Via FOIA Online*

Freedom of Information Officer  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2822T)  
Washington, DC 20460

Regional Freedom of Information Officer  
EPA Pacific Northwest (Region 10)  
1200 6<sup>th</sup> Avenue  
Seattle, WA 98101

### **Re: Request for Records about Concentrated Animal Feeding Operations in Idaho**

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch (FWW). This request seeks specific documents regarding facilities defined as concentrated animal feeding operations (CAFOs), pursuant to 40 C.F.R. § 122.23(b)(2), in Idaho.

FWW and its members have a strong interest in information related to the federal government's activities to oversee these states' Clean Water Act (CWA) national pollutant discharge elimination system (NPDES) permit programs for CAFOs, as well as the Environmental Protection Agency's (EPA) own investigatory and enforcement activities related to CAFO water, groundwater, and air pollution.

FWW is a national, non-profit, membership organization dedicated to healthy food and clean water for all. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to stand up to corporations that put profits before people, and advocate for a democracy that improves people's lives and protects our environment. Industrial livestock pollution is one of FWW's priority issues, and it is engaged in several campaigns to reduce CAFO pollution nationally through stronger regulation, transparency, and enforcement.

### **Records Requested**

Pursuant to FOIA, FWW requests copies of any and all documents, records and communications of any kind, including but not limited to e-mails, interoffice memoranda, and notes, (hereinafter records) relating to CAFOs in Idaho. FWW specifically requests the following:

- Any CAFO NPDES permits currently in effect and any applications for NPDES permits currently pending, including Nutrient Management Plans, that are in EPA's possession;

- All EPA requests to CAFOs in Idaho for information, made pursuant to EPA's CWA Section 308 authority, 33 U.S.C. § 1318, all related communications, and all records received by EPA in response, from September 1, 2015 to the present;
- All records related to EPA inspections of CAFOs in Idaho from September 1, 2015 to the present, including but not limited to any soil, waste, and water monitoring data collected;
- All EPA warning letters, administrative orders, consent decrees, and other records related to EPA investigation of, and enforcement actions in response to, potential or alleged violations of federal pollution control laws by CAFOs in Idaho, from September 1, 2015 to the present; and
- All communications between EPA and the state of Idaho (including the Department of Environmental and Department of Agriculture) about CAFOs within the state from September 1, 2015 to the present.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. This request does not include any records that EPA currently maintains on its website.

To save resources and mailing expense, we request electronic copies of these documents whenever available. In addition, rather than waiting until all requested records have been assembled for the time period requested, FWW asks that you disclose responsive records as they become available to you.

### **Claims of Exemption from Disclosure**

If you regard any requested records or portions of records as exempt from disclosure under FOIA, FWW asks that you please exercise your discretion to disclose them nonetheless. After careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portions of exempt records, as required by FOIA. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial.

In accordance with the minimum requirements of your due process, this information should include:

- 1) Basic factual information, including the author, origin, date, length, and address of withheld records or portions of records; and
- 2) Explanations and justifications for denial, including identification of the exemption(s) applicable to the withheld information and explanations of how each exemption applies to each withheld record or portion of a record.

## Fee Waiver Request

FWW requests that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as FWW, access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, FWW satisfies the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(l).

### **Requirement 1: Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government**

*Factor 1: The subject matter of the requested documents concerns operations or activities of the federal government*

FWW seeks EPA records related to CAFOs and EPA’s oversight of CAFO pollution in Idaho. As this request relates to these EPA operations and activities, the information requested clearly “concerns the operations and activities of the federal government,” and therefore satisfies the first fee waiver criterion. 40 C.F.R. § 2.107(l)(2)(i).

*Factor 2: The disclosure is “likely to contribute” to understanding of federal government operations or activities*

Disclosure is “likely to contribute” to an understanding of EPA’s operations or activities, 40 C.F.R. § 2.107(l)(2)(ii), because it will shed light on what information EPA has about CAFOs and CAFO pollution, and on what activities EPA has recently undertaken to ensure that Idaho CAFO pollution is adequately regulated, to independently investigate CAFO pollution and compliance with the CWA, and to take independent enforcement action against CAFOs when necessary. The records requested will be “meaningfully informative,” *id.* of EPA’s activities because the information is not “already . . . in the public domain, in either a duplicative or a substantially identical form.” *Id.* Specific and comprehensive information about EPA’s CAFO oversight activities in Idaho is not currently publicly available. Such information will allow FWW and the public to better understand the extent of EPA’s actions to carry out its duties under the CWA and other federal laws, including its independent enforcement authority. The requested information is critical to gaining an understanding of these EPA operations and activities.

*Factor 3: The disclosure will contribute to “public understanding” of EPA’s operations and activities*

The disclosure will contribute to “public understanding” of the subject of the request because it will contribute to the understanding of a “reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 2.107(l)(2)(iii).

*See also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (in determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”).

FWW will effectively disseminate the records and otherwise make the records and information in the records accessible and available to a broad audience of interested persons. It will do so in ways that effectively contribute to the public’s understanding. FWW is a membership organization with a staff of approximately 120, including researchers, organizers, attorneys, and communications professionals. FWW has scientific and legal expertise and our staff regularly analyze data, including FOIA records, and use this information to write, speak, and advocate to the media and the public on environmental issues. FWW frequently uses FOIA records and other public data to draft and issue policy-based reports related to CAFOs, water pollution, and other issues of public interest. *See* <https://www.foodandwaterwatch.org/learn/research/>. FWW has a long history of analyzing federal government CAFO data, specifically, and making it available to the public. *See id.* FWW is therefore prepared to analyze the information and present it to the public in a way that will most effectively increase public understanding of the subject.

FWW is also well-positioned to effectively disseminate the information obtained from the disclosed records such that it reaches a broad audience of interested members of the public through diverse and highly effective channels, including: traditional media outlets; FWW’s website, Facebook page, other social media outlets, and newsletter; press releases; blog posts on websites such as the Huffington Post; presentations at community meetings and conferences attended by rural citizens impacted by CAFO pollution, environmental attorneys and advocates, and other interested members of the public; and emails to some or all of FWW’s hundreds of thousands of supporters. FWW’s work on CAFO pollution and EPA regulation of CAFOs has garnered significant media attention, including coverage in Politico, Inside EPA, Bloomberg, Greenwire, and state and local outlets across the country, demonstrating FWW’s ability to reach interested members of the public with the requested information. Further, FWW is well-known to interested members of the public and to other organizations with interested members as a national leader on issues related to CAFO pollution, which facilitates FWW’s dissemination of information to this audience.

FWW will also make the information available to national, regional, state, and local organizations with members and supporters interested in the subject, such as Earthjustice, the Socially Responsible Agriculture Project, the Center for Food Safety, the Center for Biological Diversity, Public Justice, the Waterkeeper Alliance, and the Humane Society of the United States, which cumulatively have millions of members nationwide. Due to our large membership of citizens impacted by CAFOs and interested in this subject, our demonstrated ability to effectively analyze EPA records and disseminate information to the public directly and through the media, and our relationships with other organizations that can reach a broad audience of persons interested in the information in the requested records, FWW is uniquely able to contribute to “public understanding” and meet this fee waiver criterion.

*Factor 4: The disclosure is likely to contribute “significantly” to public understanding of EPA activities*

FWW also meets the fourth fee waiver criterion, because the public’s understanding of EPA’s operations or activities related to CAFOs in Idaho “as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent.” 40 C.F.R. § 2.107(l)(2)(iv). Because FWW, our coalition partners, and interested members of the public know little about EPA’s recent oversight of Idaho CAFO pollution or whether EPA has been effectively using its investigation, information collection, or enforcement authorities to protect water quality and public health from CAFO pollution in these states, the requested disclosures will undoubtedly increase public understanding of these subjects by a significant extent.

None of the records requested are currently available on EPA’s website, elsewhere on the Internet, or have been previously published by EPA. As a result, interested members of the public are currently largely in the dark regarding EPA’s activities to oversee CAFO pollution. The requested records have significant informative value, and transparency with regard to EPA’s oversight of CAFO pollution is particularly important in states like Idaho where, contrary to EPA’s estimates that 75% of all CAFOs actually discharge, CAFOs are largely unregulated by NPDES permits because they claim that they do not discharge. Disclosure of the requested records will provide the public with a comprehensive view of EPA’s activities in Idaho, enabling FWW and the public to evaluate the consistency and effectiveness of EPA’s activities and operations.

As discussed above, FWW has demonstrated its ability to significantly increase public understanding of CAFO issues, including through the use of federal CAFO records, in the past, and given the current lack of public access to the information sought in this request, will certainly do so again in this case. FWW is experienced at analyzing, synthesizing, and distilling voluminous and complex federal agency records and making them available and easily understandable to interested members of the public. In so doing, FWW is able to ensure that the increase in public understanding of EPA’s CAFO oversight and enforcement in the state will be significant.

## **Requirement 2: Disclosure is not primarily in the commercial interest of FWW**

*Factor 1: FWW has no commercial interest in obtaining the information*

The second element of the fee waiver analysis addresses the requester’s “commercial interest” in the information. Two factors must be addressed when determining whether the information requested is “primarily in the commercial interest of the requester[s].” 40 C.F.R. § 2.107(l)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i). Here, as a nonprofit organization, FWW does not have any commercial, trade, or profit interest in the material requested. FWW will not be paid for, or receive other commercial benefits from, the publication or dissemination of the material requested. The requested material will be disseminated solely for the purpose of informing and educating the public and will not be used for or result in commercial gain.

*Factor 2: Disclosure is not “primarily in the commercial interest of the requester[s]”*

The second factor of the commercial interest consideration hinges on the primary interest in the disclosure, and requires a weighing of any commercial interest against the public interest in disclosure. 40 C.F.R. § 2.107(l)(3)(ii). Clearly, there is great public interest in the release of the materials sought because they will allow the public to learn about and evaluate the adequacy of EPA’s CAFO-related activities in Idaho. Thus, even if FWW did have some “commercial” interest in the documents requested, a complete fee waiver would still be required because FWW’s “primary” interest in the material is to inform the public about the operations and activities of the government. Therefore, this is a situation in which the “public interest is greater in magnitude than that of any identified commercial interest” of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is clearly primarily in the public interest. Therefore, the “disclosure of the information . . . is not primarily in the commercial interest of” FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

## **Conclusion**

Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of the EPA, will contribute significantly to a broad public understanding of the EPA’s activities and operations regarding CAFOs in Idaho, and will not serve any commercial interest on the part of FWW. Under these circumstances, FWW fully satisfies the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact me before incurring any costs related to this request. If EPA does not fully grant the fee waiver and costs are incurred prior to contacting me, FWW will not be responsible for those costs. FWW reserves the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at [theinzen@fwwatch.org](mailto:theinzen@fwwatch.org) or (202) 683-2457. Additionally, if you are not the proper recipient of this request, please identify which office has information responsive to this request.

Thank you in advance for your prompt reply.

Sincerely,



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